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THE SCOPE OF WHISTLEBLOWER PROTECTION IN THE
STATE OF MARYLAND: A COMPREHENSIVE
STATUTE IS NEEDED

John A. Gray†

I. INTRODUCTION

Contrary to *Time* magazine’s usual practice of choosing only one “Person of the Year,” in January, 2003, it chose three women to symbolize “The Whistleblower.”¹ The three women were Sherron Watkins, employed at that time by Enron,² Cynthia Cooper, employed by WorldCom,³ and Coleen Rowley, employed by the FBI.⁴ Sherron Watkins, a former Enron vice president, reported to Kenneth Lay, Enron’s then chairman and CEO, that the company’s accounting methods were improper.⁵ Cynthia Cooper, vice president of internal audits, reported to WorldCom’s board of directors that the company covered up $3.8 billion in losses by phony bookkeeping.⁶ Coleen Rowley is an FBI staff attorney who reported to FBI Director Robert Mueller that the Bureau had ignored pleas from her Minneapolis, Minnesota, field office to investigate a man subsequently indicted as a September 11th co-conspirator.⁷

The image of “blowing the whistle” has several connotations. One is that the sound of a whistle catches and focuses the attention of others. Another connotation is that of causing an action to stop, as when a referee blows the whistle on a playing field. The image of the whistleblower is that of someone who gets the attention of others in order to stop certain conduct. The three women selected by *Time* are

† J.D., 1980, University of Baltimore School of Law. Professor of Law, Sellinger School of Business and Management, Loyola College, Md.
2. *Id.* at 32-33.
3. *Id.* at 32. Ms. Cooper was still employed by WorldCom at the time this article was written.
4. *Id.* Ms. Rowley remained employed by the FBI at the time this article was written.
5. *Id.*
6. *Id.*
7. Lacayo & Ripley, *supra* note 1, at 32. The author describes the subjects as “three women of ordinary demeanor but exceptional guts and sense . . .”; “heroes at the scene, anointed by circumstance . . .”; “people who did right just by doing their jobs rightly . . .” *Id.*

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each an example of an "internal whistleblower." Each tried internally to stop conduct she considered harmful to the company or illegal by notifying superiors within her respective organization. None went to the press or to enforcement authorities. They are to be admired for risking retaliation from superiors in their organizations. Possible acts of retaliation may have included dismissal, decreased opportunities for promotion, change to less favorable assignments or positions within the organization, or other adverse actions. Fortunately, none of these women were subject to retaliation and, therefore, did not need whistleblower protection.

This *Time* issue, and comparable publicity, can lead people to believe that whistleblowers have legal protection when their employers dismiss or otherwise adversely mistreat them in retaliation for blowing the whistle either internally, to executive management, or externally, to the press and/or enforcement authorities. The legal reality, however, is much more complex. Typical whistleblowers are loyal long-term employees, committed to the mission and success of their companies. They typically disclose their concerns externally only after they have received no corrective response internally, and only after much agonizing. Often, whistleblowers have few or no legal remedies and pay a considerable personal and professional price. Whistleblowers have more often than not illustrated the axiom "no good deed goes unpunished." Whistleblowers frequently lose their jobs and are often unable to obtain comparable work in the same industry. As a result of the great economic and emotional stress that they undergo, it is not uncommon for whistleblowers' marriages to

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8. See Porter v. Reardon Mach. Co., 962 S.W.2d 932, 937 (Mo. Ct. App. 1998). "Internal whistleblowing" is contrasted with "external whistleblowing," which refers to an employee reporting to the press, law enforcement authorities, or another third party employer, activities that the employee believes to be unethical or illegal. *Id.*


10. *Id.*

11. The National Whistleblower Protection Act, *at* http://www.whistleblowers.org/html/model_whistleblower_law.html (last visited Mar. 17, 2004). "Realtatory action" means the discharge, suspension, demotion, . . . harassment, blacklisting or the refusal to hire an employee . . . or other adverse employment action taken against an employee in the terms and conditions of employment, or other actions which interfere with an employees' ability to engage in protected activity . . . ." *Id.* This Act has not currently been enacted in any jurisdiction. *Id.*

12. Lacayo & Ripley, *supra* note 1, at 33. "Their lives may not have been at stake, but Watkins, Rowley and Cooper put pretty much everything else on the line. Their jobs, their health, their privacy, their sanity—they risked all of them . . . ." *Id.* at 32.


14. See *id.*

15. See *id.* at 22.
break up, for them to become isolated from colleagues, to lose friends, and to even attempt suicide.\textsuperscript{16} "[W]histle-blowers don't have an easy time. Almost all say they would not do it again. If they aren't fired, they're cornered: isolated and made irrelevant. Eventually many suffer from alcoholism or depression."\textsuperscript{17} As explained in the Letter from the National Whistleblowers Center to President George W. Bush:

Today, the few employees courageous enough to step forward face uncertainty as to whether they can obtain adequate protection. Some will find a safe harbor, but most will not. The majority of whistleblowers will either fall into the hole created by the absence of any protection whatsoever, or will fail to obtain any relief due to deficiencies in many of the existing archaic whistleblower laws.\textsuperscript{18}

Whistleblowers deserve better legal protection and so does the public. The absence of whistleblower protection is a major disincentive for concerned employees to act to protect the public by blowing the whistle.

A recent common law decision in Maryland provides an opportunity to assess the status of whistleblower protection under Maryland law. \textit{Wholey v. Sears, Roebuck & Co.} recognizes for the first time in Maryland the availability of the tort of wrongful discharge to provide a remedy to employees fired in retaliation for reporting, in good faith, suspected criminal activities to public enforcement authorities.\textsuperscript{19} Would any of these three \textit{Time} whistleblowers have legal protection under current Maryland law if the identical events had occurred today in Maryland?

In this article, the term "whistleblower" refers, in general, to an employee who in good faith attempts to have his employer stop conduct that the employee reasonably believes\textsuperscript{20} to be injurious to the public\textsuperscript{21}

\textsuperscript{16} Id.
\textsuperscript{17} Lacayo & Ripley, \textit{supra} note 1, at 33.
\textsuperscript{18} \textit{See} Letter from National Whistleblowers Center to President George W. Bush (Dec. 23, 2002), \textit{at} http://www.whistleblowers.org/bushlet.htm.
\textsuperscript{19} 370 Md. 38, 70-71, 803 A.2d 482, 501 (2002).
\textsuperscript{20} \textit{See} Elletta Sangrey Callahan & Terry M. Dworkin, \textit{The State of State Whistleblower Protection}, 38 Am. Bus. L.J. 99, 120-21 (2000). The "reasonable belief" requirement is both subjective and objective. The whistleblower must actually believe that the employer conduct violates the law, and a reasonable person, given the totality of the circumstances, would also believe that the employer conduct violates the law. \textit{See} id.
\textsuperscript{21} Generally, the whistleblower sees the conduct as significantly injurious to an unknowing public. \textit{See} Sam Hananel, \textit{Whistle-Blower Report Cites Abuses}, \textit{at} http://www.whistleblowers.org/Whistle-Blower%20Report%20Cites%20Abuses.htm (last visited April 9, 2004). Based on a survey of both government and private sector whistleblowers, the National Whistleblower Center concluded that "[about] 51 percent of the respondents reported fraud or criminal practices, while 19 percent exposed health and safety problems, 10 percent disclosed environmental problems, 12 percent complained of dis-
and a violation of the law either through internal efforts—internal whistleblowing—and/or by disclosing the conduct externally, either to the press or to enforcement authorities—external whistleblowing. The good faith and reasonable belief standards do not require the whistleblower to have legal expertise in deciding whether or not specific conduct is indeed a violation of the law. It does, however, preclude any protection for an employee who knowingly makes a false report to public enforcement authorities. The phrase “whistleblower protection” refers to a law—federal, state, statutory or common law—that provides a remedy to an employee discharged or otherwise adversely treated in retaliation for the employee’s efforts to cause the employer to stop company-controlled conduct that the employee believes in good faith is in violation of the law.

This article first examines whistleblower protection available under Maryland statutory law and then the recently explained common law protection established in the Wholesy decision. In conclusion, the Article recommends that the Maryland General Assembly enact a comprehensive Whistleblower Protection Act.

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22. “Whistleblowing” has been defined as “the disclosure by organizational members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action.” Elletta Sangrey Callahan et al., Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment, 40 AM. BUS. L.J. 177, 178 (2002).

23. See supra note 20 and accompanying text.

24. Wholey, 370 Md. at 59 n.13, 803 A.2d at 494 n.13.

25. See generally Callahan & Dworkin, supra note 20, at 99-100. Typically, the whistleblower perceives the conduct not only as dangerous to the health and safety of an unsuspecting public but also as contrary to the express values of the organization. See Ronald Duska, Whistleblowing and Employee Loyalty, in CONTEMPORARY ISSUES IN BUSINESS ETHICS 295, 300 n.2 (Joseph R. Desjardins & John J. McCall eds., 1985). The act of whistleblowing, which some employees perceive as an act of disloyalty, is perceived by the whistleblower as an act of loyalty. See A.J. Geare, An Employee’s Duty of Loyalty: New Zealand Law and Practice, 20 COMP. LAB. L. & POL’Y J. 283, 284 (1999). The point that to blow the whistle for reasons of morality is to act in one’s employer’s best interests and, therefore, involves no disloyalty is cogently argued by Robert A. Larmer, Whistleblowing and Employee Loyalty, 11 J. BUS. ETHICS 125, 125-28 (1992). Larmer advances this argument against the standard view that the whistleblower’s higher loyalty to the public good trumps his/her loyalty to the employer, and against the view of Duska that employees do not have a duty of loyalty to an employer. See Duska, supra, at 297-99.

26. See infra Part II.

27. See infra Part III.

28. See infra Part V.
II. STATUTORY WHISTLEBLOWER PROTECTION UNDER MARYLAND LAW

There is no single comprehensive whistleblower statute in Maryland that covers private sector and public employees and protects both internal and external whistleblowers. The Maryland legislature has enacted four whistleblower protection statutes, each specific to a particular set of circumstances with its own enforcement process and statutory remedy.

A. Maryland Whistleblower Law in the Executive Branch of State Government

One such statute is the Maryland Whistleblower Law in the Executive Branch of State Government (the "Executive Act"). This statute provides a remedy to any employee of the executive branch who has been adversely treated for "(1) reporting what the employee reasonably believes to be: (i) an abuse of authority, gross mismanagement, or gross waste of money; (ii) a substantial and specific danger to public health or safety; or (iii) a violation of the law; or (2) for seeking a remedy provided under this Act." To obtain a remedy for an adverse retaliatory employment action, the employee may file a complaint with the Secretary of Budget and Management. If the Secretary determines that a reprisal has occurred in violation of the Executive Act, the Secretary may:

(1) order the removal of any related detrimental information from the complainant's State personnel records;

(2) require the head of the principal unit to:
   (i) hire, promote, or reinstate the complainant or end the complainant's suspension from employment;
   (ii) award the complainant back pay to the day of the violation;
   (iii) grant the complainant leave or seniority;

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29. All states encourage some form of whistleblowing via statutes that protect the reporter from retaliation. See Callahan et al., supra note 22, at 189-90. These laws vary considerably addressing such other issues as to whom the whistle should be blown, whether motive should be considered, whether the whistleblower may benefit from reporting, what standard of evidence of wrongdoing should be required, and what remedy should be provided to a whistleblower who suffers retaliation, among others. See id.

30. See infra Part II.A-E.


33. Id. § 5-305.

34. Id. §§ 5-305, 5-309.
(iv) take appropriate disciplinary action against any indi-
vidual who caused the violation; and
(v) take any other remedial action . . . .

A determination by the Secretary of whether a reprisal in violation of
the Executive Act has occurred or has not occurred may be appealed
to the Office of Administrative Hearings, whose decision is in turn
subject to judicial review. Both the administrative law judge and the
reviewing court may award reasonable attorney's fees and legal ex-
penses to a prevailing complainant.

The Executive Act's protection covers only employees of the executive
branch of the state government. The Executive Act is ambigu-
ous in that it does not indicate whether it applies to internal as well as
to external whistleblowers. It does not state expressly "to whom" the
employee must have disclosed the information for the disclosure of
which the employee has suffered a reprisal. Also, the executive
branch employee has no private cause of action. If the Secretary's
determination favors the employee, the burden is on the executive
branch employer to appeal for a review by an administrative law judge
and, if that outcome is still unfavorable, to a circuit court. If the
Secretary's determination is unfavorable to the employee, then the
burden is on the employee to move forward with the appeal process.

What additional protection, if any, does the Executive Act provide
to those executive branch employees who have tenure as civil servants
beyond the protection already provided under state statutory and
state and federal constitutional safeguards against retaliatory employ-
ment actions? Maryland's Personnel and Pensions Article provides a
grievance procedure to challenge inappropriate disciplinary actions
by supervisors and managers as well as providing remedies when such
actions are determined to have occurred. The Due Process Clause
of the Fourteenth Amendment to the U.S. Constitution imposes on
public sector employers, substantive and procedural requirements
whenever the state acts to deprive a tenured civil servant of his/her
"property right" in a government job. Substantive due process re-

35. Id. § 5-309(e).
36. Id. § 5-310.
37. Id. §§ 5-310(d), 5-311.
38. Id. § 5-301. "This subtitle applies to all employees and State employees who
are applicants for positions in the Executive Branch of State government,
including a unit with an independent personnel system." Id.
39. Id. § 5-307. "Election of procedures. - An employee . . . may elect to file:
(1) a complaint under § 5-309 of this subtitle; or (2) a grievance under
Title 12 of this article." Id. § 5-307(a).
40. Id. § 5-310(a), (e); MD. CODE ANN., STATE GOV'T § 10-222 (1999).
41. MD. CODE ANN., STATE PERS. & PENS. § 5-310(a), (e); MD. CODE ANN., STATE
GOV'T § 10-222.
42. See generally MD. CODE ANN., STATE PERS. & PENS. § 12-103 (1997 & Supp.
2003).
43. See MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 586 (West 1994).
quires that the state's deprivation be reasonably related to a legitimate state interest; that is, the state must be prepared to show that any adverse employment action in retaliation for whistleblowing is not arbitrary and capricious. The statute expressly provides that it "does not prohibit a personnel action that would have been taken regardless of a disclosure of information." Procedural due process requires that, prior to deprivation, the employee be given adequate notice and an opportunity to tell his or her side of the story.

B. The Health Care Worker Whistleblower Protection Act

A second statute, enacted in 2002, is the Health Care Worker Whistleblower Protection Act (the "Health Care Act"), which provides protection to board-certified or licensed health-care workers, but expressly excludes state employees. The statute prohibits an employer from taking or refusing to take any personnel action as a reprisal against a covered employee because the employee:

(1) Discloses or threatens to disclose to a supervisor or board an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation;
(2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of a law, rule, or regulation by the employer; or
(3) Objects to or refuses to participate in any activity, policy, or practice in violation of a law, rule, or regulation.

The whistleblower protection is available only if:

(1) The employee has a reasonable, good faith belief that the employer has, or still is, engaged in a violation . . .

48. Id. § 1-501. Section 1-501(c) states: "(1) 'Employee' means any individual licensed or certified by a board under this article who performs services for and under the control and direction of an employer for wages or other remuneration. (2) 'Employee' does not include a State employee." Id. § 1-501(c).
49. Section 1-501(d) defines a "supervisor" as "any individual within an employer's organization who has the authority to direct and control the work performance of an employee, or who has managerial authority to take corrective action regarding the violation of a law, rule, or regulation of which the employee complains." Id. § 1-501(d).
50. "'Board' means any board established under [the Health Occupations] article." Id. § 1-501(c).
51. Id. § 1-502(1), (2), (3).
The employer's activity, policy, or practice that is the subject matter of the disclosure poses a substantial and specific danger to the public health or safety; and

Before reporting to the board:

(i) The employee has reported the activity, policy, or practice to a supervisor or administrator of the employer in writing and afforded the employer a reasonable opportunity to correct the activity, policy, or practice; or

(ii) If the employer has a corporate compliance plan specifying who to notify of an alleged violation of a rule, law, or regulation, the employee has followed the plan.

The Health Care Act provides a private cause of action, which must be brought within one year after the reprisal occurred or within one year after the employee first became aware of the reprisal. A court may:

(1) Issue an injunction to restrain continued violation . . . ;
(2) Reinstate the employee to the same, or an equivalent position held before the violation . . . ;
(3) Remove any adverse personnel record entries based on or related to the violation . . . ;
(4) Reinstate full fringe benefits and seniority rights;
(5) Require compensation for lost wages, benefits, and other remuneration; and
(6) Assess reasonable attorney's fees and other litigation expenses against:
   (i) the employer, if the employee prevails . . . .

The court may also assess attorney's fees and litigation expenses against the employee if the court determines that the employee brought the action "in bad faith and without basis in law or fact." The employer has a valid defense if the personnel action claimed to be a reprisal for whistleblowing was based on grounds other than the employee's exercise of any rights protected under the Health Care Act.

52. See id. § 1-503(1), (2), (3).
53. See id. § 1-504(a), (b).
54. See id. § 1-505(1) to (6).
55. Id. § 1-505(6)(ii).
First, the Health Care Act provides a private cause of action with a one-year statute of limitation. Second, it does not protect all healthcare workers in Maryland. The Health Care Act covers board-certified or licensed-health-care workers in the private sector, or those who work for local-public-health-care entities. It does not protect non-board licensed or uncertified-health-care workers in either the private or public sector—non-medical personnel such as managers or administrators. It does not protect licensed health-care workers who are state employees. Third, the Health Care Act provides protection only if: (a) a covered worker has first formally and in writing engaged in internal whistleblowing; and (b) the report concerns employer activity that creates a substantial and specific danger to the public health or safety, but not when the illegal employer activity disclosed violates other laws—e.g., fraudulent financial reporting. Fourth, the Health Care Act provides a remedy for internal whistleblowing. The Health Care Act creates a situation where a private health-care employer has an opportunity to stop an activity that creates a substantial and specific danger to the public health or safety; if it does not stop, it may not retaliate against the licensed health-care worker who first called it to the employer’s attention and subsequently reported it to the board.

C. Maryland Occupational and Safety Health Act (MOSHA)

A third Maryland whistleblower protection statute is the MOSHA anti-retaliation provision enacted to protect employees for reporting occupational safety and health violations. The provision states that:

(b) An employer or other person may not discharge or otherwise discriminate against an employee because the employee:
   (1) Files a complaint related to [occupational safety and health];
   (2) Brings an action . . . or a proceeding . . . or causes the action or proceeding to be brought;
   (3) Has testified or will testify in an action . . . or a proceeding . . . ; or
   (4) Exercises, for the employee or another, a right under this title.

An employee who believes that an employer or other person has discharged or otherwise discriminated against the employee must submit, within thirty days after the alleged discrimination, a signed,

57. Md. Code Ann., Health Occ. § 1-504(b).
58. Id. § 1-501.
59. See id.
60. Id. § 1-503.
61. Id. § 1-502(1).
63. Id.
written complaint to the Commissioner of Labor and Industry.\textsuperscript{64} If the Commissioner determines that an employer or other person has violated the prohibition against retaliatory action, the Commissioner must file a complaint in the appropriate circuit court to enjoin the violation,\textsuperscript{65} to reinstate the employee to the former position with back pay,\textsuperscript{66} and for other appropriate relief.\textsuperscript{67} Within ninety days after the Commissioner receives a complaint, the Commissioner must notify the employee of the determination.\textsuperscript{68} Section 5-215(a) permits any person aggrieved by any order of the Commissioner to obtain judicial review in the circuit court.\textsuperscript{69} The Act does not provide a private cause of action.\textsuperscript{70}

Nothing in MOSHA purports to give an employee any private right of action in court for a violation of a health and safety standard . . . . \[T]he remedy afforded is a complaint to the Commissioner, who alone is authorized to file an action . . . . \[T]he exclusive remedy for a MOSHA related wrongful discharge [is] under art. 89, § 43(b) and that a tort action under \textit{Adler} did not exist for such a discharge.\textsuperscript{71}

\textbf{D. Maryland Fair Employment Practices Act (FEPA)}

The fourth statute is Article 49B, the FEPA, which has an anti-retaliatory provision to protect private and public sector employees who oppose or report discriminatory practices.\textsuperscript{72} FEPA uses the following language:

\begin{quote}
It is an unlawful employment practice for an employer to discriminate against any of its employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because the individual has opposed any practice made an unlawful employment practice . . . or because the individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing . . . .
\end{quote}

If an employee thinks that the employer has committed a retaliatory act, the employee must file a complaint within six months of the act

\textsuperscript{64} \textit{Id.} § 5-604(c) (2).

\textsuperscript{65} \textit{Id.} § 5-604(d) (2).

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} \textit{Id.}

\textsuperscript{68} \textit{Id.} § 5-604(d) (3).

\textsuperscript{69} \textit{Id.} § 5-215(a) (1), (2).

\textsuperscript{70} \textit{Id.} § 5-215(d) (3).

\textsuperscript{71} Silkworth \textit{v. Ryder Truck Rental Inc.}, 70 Md. App. 264, 269-70, 520 A.2d 1124, 1127-28 (1987). See also \textit{Adler v. Am. Standard Corp.}, 830 F.2d 1303 (4th Cir. 1987).


\textsuperscript{73} \textit{Id.}
with the Human Relations Commission (HRC) for investigation. If the HRC finds that there is probable cause for believing a retaliatory act has been committed, the HRC must first undertake to remedy the act by conference, conciliation and persuasion; and if that fails, file a complaint with a hearing examiner. If the hearing examiner determines, upon all the evidence, that a discriminatory act has been committed, Article 49B, section 11(e) of the Maryland Annotated Code provides:

[T]he remedy may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief that is deemed appropriate. The award of monetary relief shall be limited to a 36-month period. The complainant may not be awarded monetary relief for losses incurred between the time of the Commission's final determination and the final determination by the circuit court or higher appellate court, as the case may be. Interim earning or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the monetary relief otherwise allowable.

"Opposing" a discriminatory employment practice includes protesting it internally (internal whistleblowing) as well as filing a complaint with the HRC (external whistleblowing), regardless of whether or not the source is a direct victim of a discriminatory practice. Section 16(f) of the Maryland FEPA is based on its federal counterpart, § 2000e-3(a) of the Civil Rights Act of 1964. In Chappell v. Southern Maryland Hospital, the Court of Appeals of Maryland stated that "[t]he opposition . . . clauses . . . have been liberally applied by the courts to shield employees who speak out against an employer's unlawful employment practices . . . ."
In Chappell, the plaintiff, Robert Chappell, claimed that Southern Maryland Hospital had fired him in retaliation for his reporting employment practice violations to hospital senior management. The court determined that "Chappell can pursue a remedy under both the state and federal anti-discrimination statutes for his discharge from employment for apprising his employer of allegedly discriminatory employment practices."

Maryland's anti-discrimination statute does not contain a "provision for a private right of action to enforce its prohibition of discrimination." If the complaining employee, however, works for an employer with fourteen or fewer employees and is dismissed in retaliation for opposing employer improprieties, the employee may bring a tort of abusive discharge. In addition, the Maryland FEPA does not authorize direct civil actions by the Commission in circuit court. She complained to her employer about its discriminatory practices of soliciting applicants for sales work according to their sex, and by limiting the job opportunities and base pay of its female salespersons, was entitled to reinstatement with back pay and salary equal to male counterparts, court costs, and attorney's fees; Berg v. La Crosse Cooler Co., 612 F.2d 1041, 1045 (7th Cir. 1980) ("By protecting employees from retaliation, [§ 2000e-3(a)] is designed to encourage employees to call to their employers' attention discriminatory practices of which the employer may be unaware or which might result in protracted litigation to determine their legality if they are not voluntarily changed."); Eichman v. Ind. State Univ. Bd. of Trustees, 597 F.2d 1104 (7th Cir. 1979) (plaintiff who alleged that he assisted a woman who was trying to exercise her Title VII rights to retain her job, and that his discharge was in retaliation for that assistance, sufficiently states a claim under § 2000e-3(a)); Jones v. Lyng, 669 F. Supp. 1108, 1121 (D.D.C. 1986) ("The 'opposition clause' protects statements by a person . . . who is not himself the direct victim of the discriminatory practice but who opposes such discrimination against others."); Jenkins v. Orkin Exterminating Co., Inc., 646 F. Supp. 1274 (E.D. Tex. 1986) (employee who was terminated for telephoning district manager to complain on behalf of another employee he believed to be experiencing sexual harassment was protected under the opposition clause of § 2000e-3(a)); Crockwell v. Blackmon-Mooring Steamatic, Inc., 627 F. Supp. 800 (W.D. Tenn. 1985) (plaintiff demonstrated a prima facie case of retaliatory discharge under § 2000e-3(a) by showing that her stated objections to her employer regarding sexual harassment of a co-worker most likely prompted her discharge); and Spence v. Local 1250, United Auto Workers, 595 F. Supp. 6 (N.D. Ohio 1984) (employee who was fired for speaking out against his employer's practices, which he believed to be racially discriminatory against a fellow employee, was participating in protected activity under § 2000e-3(a)).

Id. 82. Chappell, 320 Md. at 485-86, 578 A.2d at 768.
83. Id. at 496, 578 A.2d at 773.
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court; a “plaintiff ordinarily must invoke and exhaust his administra­
tive remedies before maintaining an action.”

E. Summary of Maryland Whistleblower Statutes

In summary, Maryland statutes provide a remedy to whistleblowers in four specific situations: (1) when an employee of the executive branch discloses a violation of the law or abuse of authority or gross waste of funds in the executive branch; (2) when licensed health-care workers, other than state employees, report or threaten to report illegal activity creating a substantial and specific health threat; (3) when an employee discloses a MOSHA violation to MOSHA authorities; and (4) when an employee opposes a discriminatory act. Each statute provides a statutory remedy and a procedure to obtain it. Of these four statutes, only the Health Care Act expressly provides a private cause of action as the enforcement mechanism. Maryland common law recognizes the availability of the tort of abusive discharge for employees injured in violation of its FEPA anti-retaliation provision who work for an employer with fourteen or fewer employees.

The language in two of the statutes reviewed indicates that they do protect internal whistleblowers. Maryland’s Health Care Act provides a private cause of action to cover health-care workers whose employer retaliates against them for threatening to make a disclosure of what the employee reasonably believes in good faith to be an illegal act by their employer or only for having reported such to a supervisor. The anti-retaliation provision of the FEPA indicates that it is a violation of the statute for an employer to retaliate against an employee who “opposes” internally what the employee in good faith considers to be a discriminatory act in violation of the law. “Opposing” may be no more than internally protesting the allegedly illegal activity. The following table compares the four statutes on a number of points:

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87. Md. Code Ann., Health Occ. § 1-504 (Supp. 2003); see also supra notes 51-54 and accompanying text.


None of these statutory provisions would have benefited any of the *Time* whistleblowers if they had been victims of retaliatory actions by employers in the state of Maryland. 91 This is because none of the whistleblowers were employees of the executive branch of government, opposed a discriminatory activity, was a licensed health-care worker disclosing a specific and substantial danger to the public safety and health, or adversely treated for reporting a MOSHA violation. 92 If existing Maryland statutory law would not have provided any of them with a remedy for an employer retaliatory action, would Maryland common law?


92. See generally id. Furthermore, none of the whistleblowers were fired for refusing to engage in an illegal act as a condition of employment, for which the tort of abusive discharge provides a remedy. See generally id.
III. MARYLAND COMMON LAW: WHOLEY V. SEARS, ROEBUCK, & CO.:93 THE "EXTERNAL WHISTLEBLOWING" TORT OF ABUSIVE DISCHARGE

The tort of abusive discharge is a common-law theory of recovery that provides a remedy when an employer’s dismissal of an employee contravenes a clear mandate of public policy,94 and the source of that policy does not provide a remedy.95 Typical examples include when an employer fires an employee in retaliation for the employee’s refusal to commit an illegal act at the command of the employer,96 to forego the exercise of a legal right,97 or to forego the exercise of an important civic duty.98 This tort also arises when an employer’s motivation contravenes Maryland anti-discrimination laws that do not provide a statutory remedy.99

A. Circuit Court of Anne Arundel County.

Sears employed Mr. Wholey for twenty-four years as a security officer, and during most of that time he was simultaneously employed as a law enforcement officer.100 His duties included “investigating suspicious behavior and reporting thefts of the store’s merchandise by both

93. 370 Md. 38, 803 A.2d 482 (2002).
94. See Molesworth v. Brandon, 341 Md. 621, 629, 672 A.2d 608, 612 (1996). While the source of a claimed public policy might be a constitution, a statute, administrative regulations, or common-law decisions, the public policy must be clearly mandated to serve as the basis for a wrongful discharge action because the clarity of the mandate “limits judicial forays into the wilderness of discerning ‘public policy’ without clear direction from a legislative or regulatory source.” Milton v. IIT Research Inst., 138 F.3d 519, 523 (4th Cir. 1998).
99. See Molesworth, 341 Md. at 630, 636-37, 672 A.2d at 613-14, 616 (holding that where an employer had fewer than fifteen employees the tort of abusive discharge was available to employees to remedy gender based discharge because of lack of statutory remedy). See also John A. Gray, Statutory Workforce Size Requirement and the Tort of Abusive Discharge: Small Employers Beware, 47 LAB. L.J. 13, 15 (1996) [hereinafter Abusive Discharge]; John A. Gray, Workforce Size and Remedies for Discrimination in Employment: Wrongful Discharge and Future Possibilities, 15 MIDWEST L. REV. 79 (1997) [hereinafter Wrongful Discharge].
customers and employees." Mr. Wholey reported to his Sears supervisor what appeared to be repeated thefts of company property by a store manager and was authorized to install a surveillance camera in the suspect’s office. Subsequently, he was ordered to remove the camera and was fired shortly thereafter. Mr. Wholey contended that Sears fired him in retaliation for investigating and reporting the store manager’s suspected criminal activity and filed a wrongful discharge claim. Sears contended that it fired Mr. Wholey for failing to perform his duties the prior winter during a blizzard.

At trial, Sears argued that there was no clear mandate of public policy in Maryland that favored the investigation of criminal activity; therefore, Mr. Wholey’s termination did not violate public policy, and was not actionable as a matter of law. The trial court disagreed with this argument holding that Maryland public policy favors the investigation and prosecution of crimes. The jury returned a verdict against Sears on Mr. Wholey’s wrongful discharge claim and awarded $166,000 in damages.

B. Court of Special Appeals.

A three-judge panel of the Court of Special Appeals of Maryland reversed the judgment of the trial court and unanimously held that Sears had violated no clear mandate of public policy when it terminated Mr. Wholey. On appeal, Sears relied on the Fourth Circuit’s reasoning in Adler v. American Standard Corporation (“Adler III”). In Adler III, the court considered whether an employer violates Maryland public policy when it terminates an employee in retaliation for his disclosure of wrongdoing to higher corporate officers. The court held “that, while the public policy of Maryland clearly proscribes terminating an at-will employee for refusing to engage in illegal activity or for complying with, or stating an intention to fulfill, a statutorily

101. Id. at 44, 803 A.2d at 485.
102. Id.
103. Id. at 44-45, 803 A.2d at 485.
106. Id.
107. Id. at 648, 779 A.2d at 411.
108. Id. at 642, 779 A.2d at 408.
109. Id. at 663, 779 A.2d at 420.
110. Id. at 648-49, 779 A.2d at 412 (citing Adler v. Am. Standard Corp., 830 F.2d 1303 (4th Cir. 1987)).
111. See Adler, 830 F.2d at 1303.
prescribed duty, it did not proscribe terminating such an employee for ‘whistle blowing.'” Furthermore, the Fourth Circuit stated:

In the absence of a clear declaration by [the Maryland] legislature or the Maryland Court of Appeals that an action for [wrongful] discharge should be extended to situations where the discharged employee claims to have had the knowledge and intent to report wrongdoing to a higher corporate official, this court should not create such a ruling . . . . [The plaintiff’s] allegations and evidence reveal nothing more than his discharge resulting from his intention to blow the whistle on illegal activities condoned by his supervisors . . . and their efforts to protect themselves by discharging him. This . . . does not involve an effort by [the plaintiff] to fulfill a statutorily prescribed duty nor his failure to engage in illegal activity.”

While Sears relied on Adler III to support its argument on appeal, Mr. Wholey relied on the Illinois case of Palmateer v. International Harvester. In Palmateer, an at-will employee reported suspected criminal activity by a co-employee to the police, and offered to assist them in the investigation and trial.

When his employer learned of this, [he was fired]. In a [four] to [three] decision, the Supreme Court of Illinois held that terminating an at-will employee for reporting a crime to the authorities is contrary to the ‘clear public policy favoring investigation and prosecution of criminal offenses,’ and therefore gives rise to a cause of action for wrongful discharge.

Adler III explained that the plaintiff had no statutory legal duty under Maryland law to report suspected criminal activity and the employer did not require the employee to engage in any unlawful activity. In contrast, Palmateer sustained a cause of action for an external whistleblower even in the absence of any statutory duty to report criminal activity or any employer requirement to commit illegal activity.

112. Sears, Roebuck & Co., 139 Md. App. at 653, 779 A.2d at 414 (discussing Adler, 830 F.2d at 1506-07).
113. Id. at 127.
115. Id. at 127.
117. See Adler, 830 F.2d at 1307.
118. See Palmateer, 421 N.E.2d at 881.
After reviewing the cases on which the parties relied on appeal, the court of special appeals then discussed Milton v. IIT Research Institute. In Milton, the Fourth Circuit, applying Maryland law, adhered to its holding in Adler III that discharging an at-will employee for 'whistle-blowing' is not a violation of a clearly mandated Maryland public policy, unless the employee had a legal duty to report the criminal activity. In Milton, the employee became convinced that the corporation was engaging in illegal schemes to avoid reporting taxable income to the IRS, and reported his concerns to management. When his superiors failed to rectify the problem, he reported his concerns to the chairman of the board. His superiors then demoted him. When he complained, they fired him. Applying Maryland law, the Fourth Circuit affirmed the district court's holding that the plaintiff did not and could not allege that he was fired for refusing to engage in unlawful activities himself or that he had a statutory duty to disclose the company's wrongdoing to its board. The court stated that:

Milton argues that his fiduciary obligations as an officer of IITRI supply the legal duty . . . . The broad fiduciary obligations of "care and loyalty" are simply too general to qualify as a specific legal duty that will support the claim that his discharge violates a "clear mandate of public policy."

Based on its acceptance of the Adler III and Milton decisions, the Court of Special Appeals of Maryland, in deciding Sears, Roebuck & Co., concluded:

The conduct at issue in this case is one employee's act of investigating possible theft from his employer by a co-employee. Nothing in Maryland's general theft statute or any other enactment mandates that a citizen of Maryland who suspects that another person (co-employee or otherwise) may have committed a theft must report, let alone investigate, that suspicion. To be sure, it might serve the public good for citizens to look into possible criminal acts of others, including co-employees, and report their suspicions to the authorities. We do not subscribe to the view, however, that conduct we might think would promote the good of society as a whole is, because we think so, favored public policy of this State. To find a clear mandate of public policy, we must

119. 138 F.3d 519 (4th Cir. 1998).
120. Sears, Roebuck & Co., 139 Md. App. at 657, 779 A.2d at 416-17 (discussing Milton, 138 F.3d at 519).
121. Milton, 138 F.3d at 521.
122. Id.
123. Id.
124. Id.
125. See id. at 521-23.
126. Id. at 523.
look to already existing sources of policy expression. In the absence of any legislative or existing judicial pronouncement in this state directing private citizens to investigate possible acts of theft by co-workers or others, we find no origin for the public policy essential to Wholey’s wrongful discharge claim. 127

... In Maryland, we have found a clear mandate of public policy in favor of reporting possible criminal conduct of others to the authorities when, by statute, a person is required to make such a report. There was no such statutory directive in this case. 128

C. Court of Appeals of Maryland

The Court of Appeals of Maryland recognized the availability of the tort of abusive discharge in the absence of any legal duty to report. 129

There were three opinions: (1) a plurality of three judges creating a new application of the tort of abusive discharge for external whistleblowing, but rejecting its application to the plaintiff-employee internal whistleblower; 130 (2) a second opinion by two judges concurring in the judgment against the plaintiff, but rejecting the reasoning of the plurality; 131 and (3) two dissenting judges asserting a broader scope for the tort’s availability, implicitly inclusive of the plurality’s position but going beyond it. 132

The two principal issues were whether Maryland recognized the availability of the tort of abusive discharge to provide a remedy for whistleblowers and, if so, whether or not it was available to the plaintiff-discharged employee. 133

The decisional issue before this Court is whether Maryland recognizes a common law public policy exception to the at-will-employee-doctrine whereby discharging an employee for investigating and reporting the suspected criminal activity of a co-worker would constitute a wrongful discharge. We conclude that a clear public policy mandate exists in the State of Maryland.

128. Id. at 662, 779 A.2d at 419-20. For example, Maryland Family Law Article provisions and implementing regulations require specific professionals and law enforcement personnel to report suspected child abuse or neglect to state authorities. See Bleich v. Florence Crittenton Servs. of Baltimore, 98 Md. App. 123, 135-46, 632 A.2d 463, 469-75 (1993). Firing an employee for complying with these requirements constitutes the tort of abusive discharge because neither the statute creating the obligation nor its implementing regulations provide a civil remedy for violations. Id.
130. See id. at 63-67, 803 A.2d at 496-99 (plurality opinion).
131. See id. at 71-76, 803 A.2d at 501-04 (concurring opinion).
132. See id. at 76-77, 803 A.2d at 504-05 (dissenting opinion).
133. See id. at 48, 803 A.2d at 487.
Maryland which protects employees from a termination based upon the reporting of suspected criminal activities to the appropriate law enforcement authorities. While we recognize such an exception, the petitioner’s actions in this case, i.e. the investigation of suspected criminal activity of a store manager and reporting of that suspicion to his supervisors, do not qualify for this exception.134

Five of the seven judges held that the tort was available for external whistleblowers;135 three of these, only for external whistleblowers;136 and the other two for all whistleblowers.137 The remaining two judges completely rejected the availability of the tort for any whistleblowers.138

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<th>Is there a clear mandate of public policy?</th>
<th>Is the tort available to this plaintiff?</th>
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<td>Plurality (3)</td>
<td>Yes.</td>
<td>No.</td>
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<td>Concurring in result (2)</td>
<td>No.</td>
<td>No.</td>
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<tr>
<td>Dissenting (2)</td>
<td>Yes, but in a wider sense.</td>
<td>Yes.</td>
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Before resolving whether the tort of abusive discharge provided a remedy for whistleblowers, the court of appeals had to answer two questions: First, whether there was a clear mandate of public policy in Maryland in favor of reporting suspected criminal activity; and, second, whether there was a statutory remedy available.139

The plurality found the clear mandate of public policy in a state criminal statute not even discussed by the lower courts.140 An “express statutory mandate” makes it a misdemeanor offense for a person “who harms or injures another’s person or property in retaliation for

134. Id. at 43, 803 A.2d at 484.
135. See id. at 43, 803 A.2d at 484 (plurality opinion) (Battaglia, Cathell, & Harrell, JJ.); id. at 76, 803 A.2d at 504 (dissenting opinion) (Eldrige, J. & Bell, C.J.).
136. See id. at 71, 803 A.2d at 501 (plurality opinion) (Battaglia, Cathell, & Harrell, J.J.). See also infra notes 149-153 and accompanying text.
137. See Wholey, 370 Md. at 76, 803 A.2d at 503 (dissenting opinion) (Eldrige, J. & Bell, C.J.). See infra notes 171-174 and accompanying text.
138. See Wholey, 370 Md. 72-73, 803 A.2d at 502 (concurring opinion) (Raker & Wilner, JJ.). See infra notes 175-180 and accompanying text.
139. See Wholey, 370 Md. at 48, 803 A.2d at 487.
140. See id. at 57-58, 803 A.2d at 493. See also Sears, Roebuck & Co. v. Wholey, 139 Md. App. 642, 648, 661, 779 A.2d 408, 411, 419 (1999), aff’d, 370 Md. 38, 803 A.2d 482 (2002) (indicating no reference to a state criminal statute by the court of special appeals or the trial court).
reporting a crime." Section 9-303 of the Criminal Law Article of the Annotated Code of Maryland provides:

(a) Prohibited. – A person may not intentionally harm another or damage or destroy property with the intent of retaliating against a victim or witness for:
(1) giving testimony in an official proceeding; or
(2) reporting a crime or delinquent act.
(b) Penalty. – A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding five years.

Further, any person who “has reported a crime or delinquent act to a law enforcement officer, prosecutor, intake officer, correctional officer, or judicial officer” pursuant to section 9-301(d)(3) of the Criminal Law Article of the Annotated Code of Maryland is considered a witness against whom retaliation for reporting a crime is prohibited.

For the plurality, this statutory protection for witnesses of a crime implied a public policy in favor of reporting criminal activity to public authorities. The plurality observed that “[f]rom these statutory provisions, a clearly definable public policy goal is derived: the Legislature sought to protect those witnesses who report suspected criminal activity to the appropriate law enforcement or judicial authority from being harmed for performing this important public task.”

Because this statute provided only a criminal penalty to a discharged whistleblower, the plurality concluded that the tort was available to provide a civil cause of action. The court thus held that

143. Id. § 9-301(e) (corresponds to former Md. Ann. Code art. 27, § 760(d)(3)).
144. See Wholey, 370 Md. at 59, 803 A.2d at 494 (Battaglia, J., plurality).
145. Id. The court noted that the Arkansas Supreme Court recognized a similar public policy favoring employee-informants in a 1988 case, in which it based its public policy exception on a statute similar to Maryland’s. Id. at 59 n.13, 803 A.2d at 494 n.18 (citing Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 385-86 (Ark. 1988)).
146. See Wholey, 370 Md. at 59-60, 803 A.2d at 494 (Battaglia, J., plurality) (“[W]e now conclude that while Section 762 creates a criminal cause against those who retaliate against witnesses who report crimes, the tort of wrongful discharge provides a civil remedy.”). This recognition of a clear mandate of public policy is similar to that in Insignia Residential Corp. v. Ashton, in which the court of appeals recognized a clear mandate of public policy in the criminal prohibition of solicitation of prostitution as a basis for the tort of abusive discharge in circumstances where repeated, unwelcome sexual propositions by a foreman resulted in a constructive discharge of the employee. 359 Md. 560, 573, 755 A.2d 1080, 1087 (2000). Instead of pursuing a statutory remedy under federal or state anti-discrimination in employment laws, the plaintiff chose to seek a common law tort remedy. Id. See also John A. Gray, Sexual Harassment, Prostitution, and the Tort of Abusive Dis-
"terminating employment on the grounds that the employee (as a victim or witness) . . . reported a suspected crime to the appropriate law enforcement or judicial officer is wrongful and contrary to public policy."  

Theoretically, the state could have prosecuted whoever fired Mr. Wholey for a criminal violation; and, if Mr. Wholey had reported the suspected theft to the police, he could have sued his employer, although not the supervisory co-employee, for wrongful discharge.  

On the issue of whether the tort was available to all whistleblowers, internal and external, the plurality rejected its availability to internal whistleblowers. While noting that other states had done so, the plurality refused because the state legislature enacted whistleblower protection only for employees reporting violations to public enforcement authorities.  

In the limited times that the Legislature has enacted whistleblower protection to protect private employees, the protection is only valid when the employee/whistle-blower reports the suspect activity externally. For example, Section 5-604(b) of the Labor and Employment Article protects an employee who files a complaint or brings an action for violations of the Occupational Safety and Health title by his or her employer. Maryland's anti-discrimination laws protect  

charge: An Analysis and Evaluation of Recent Legal Developments, 9 BUFF. WOMEN'S L.J. 169, 181 (2001). Similarly, the court of appeals recognized the availability of the tort when an employee was discharged solely because the employee filed a worker's compensation claim, because the law created a criminal cause against the employer but no civil remedy for the victim. See Finch v. Holladay-Tyler Printing, Inc., 322 Md. 197, 200-02, 586 A.2d 1275, 1277-78 (1991) (citing Ewing v. Koppers Co., 312 Md. 45, 537 A.2d 1173 (1988)).  

147. Wholey, 370 Md. at 61, 803 A.2d at 495. The tort of abusive discharge provides a remedy for the violation of a clear mandate of public policy in situations where a remedy is not otherwise available: "The first limiting factor with respect to adopting a 'new' public policy mandate for a wrongful discharge claim is derived from the generally accepted purpose behind recognizing the tort in the first place: to provide a remedy for an otherwise unremedied violation of public policy." Id. at 52, 803 A.2d at 490 (Battaglia, J., plurality).  

148. Id. at 59-60, 803 A.2d at 494. See also Moniodis v. Cook, 64 Md. App. 1, 14, 494 A.2d 212, 218-19 (1985) (holding that a tort claim of action was available to a plaintiff employee when fired for refusing to take a lie detector test when a state statute prohibited such a demand), superseded by Md. ANN. CODE art. 100, § 95; Weathersby v. Kentucky Fried Chicken Nat'l Mgmt. Co., 86 Md. App. 533, 542, 587 A.2d 569, 573 (1990) (explaining that Md. ANN. CODE art. 100, § 95, as amended, provides a statutory cause of action for employees wrongfully discharged for refusing a polygraph test and codified the common law tort).  

149. See Wholey, 370 Md. at 63, 803 A.2d at 496-97 (Battaglia, J., plurality).  


151. See Wholey, 370 Md. at 67-68, 803 A.2d at 499-500 (Battaglia, J., plurality).
private employees who have opposed any unlawful discriminatory practice in which the employer engages, or reported . . . the employer’s discriminatory practices. See Md. Code, Art. 49B, § 16(f). Similarly, with respect to Article 27, Section 762, the Legislature created a clear and unmistakable prohibition against retaliating against a person who reports criminal activity, externally, to the appropriate law enforcement authorities. We believe a corresponding common law cause of action must also require external reporting to the appropriate law enforcement authorities.152

We refuse to take the specific factual circumstance before us and induce from it an all-encompassing exception . . . which declares that the act of investigating criminal activity is a per se public benefit, the termination for which, is actionable in tort law. Our legislature has declined to encroach upon the employment decisions of private companies through creation of a general all-encompassing “whistleblower protection” statute which would protect employees who investigate and internally report suspected criminal activity; we, in turn, decline to act in its stead . . . . We similarly limit the public policy exception to those who report criminal activity to the appropriate authorities.153

In sum, protecting internal whistleblowers is not the public policy in the state of Maryland, but protecting external whistleblowers is. After addressing the principal issues of the case, the plurality next addressed Mr. Wholey’s two contentions.154 First, Mr. Wholey argued that when investigating employee theft at Sears, he was acting not merely as a Sears security officer but in his capacity as sworn deputy sheriff.155 The court rejected this argument on the grounds that Mr. Wholey was merely fulfilling the specific private employment duty of protecting the private proprietary interests of Sears, for which he was hired, and did not face any specific legal risk for failing to pursue his employer’s requested investigation of employee thefts.156

The court next addressed Mr. Wholey’s second argument—that he was acting in the public good by investigating criminal activity:

Nor can [Mr. Wholey] seek protection from an esoteric theory about acting in the “public good” by investigating criminal activity. The public good is best served by reporting suspected criminal activity to law enforcement authorities; an action which [Mr. Wholey] . . . did not take . . . . Further-

152. Id. at 63, 803 A.2d at 496-97 (Battaglia, J., plurality) (footnote omitted).
153. Id. at 67-68, 803 A.2d 499-500 (Battaglia, J., plurality).
154. See id. at 63-67, 803 A.2d at 497-99.
155. See id. at 63-64, 803 A.2d at 497.
156. See id. at 64-65, 803 A.2d at 497-98.
more, we decline to create a tort cause of action based *solely* on transcendental notions of that which is in the public interest, particularly when our own Legislature has declined to make individual citizens criminally responsible for failing to investigate or report criminal activity.\textsuperscript{157}

The plurality then revisited the precedents primarily relied on by the parties on appeal.\textsuperscript{158} Mr. Wholey relied primarily on the decision of the Supreme Court of Illinois in *Palmateer*.\textsuperscript{159} While acknowledging that the public reporting public policy exception created by the Illinois court twenty years earlier is the same as that created by the Court of Appeals of Maryland in the instant case, the plurality criticized the way in which the *Palmateer* court reached its decision.\textsuperscript{160} Specifically, the plurality stated:

The *Palmateer* court based its holding entirely on abstract notions of that which constitutes the public good. [S]uch a policy mandate was unsupported by any legislative enactment and was grounded only in the obscure belief that public policy insists that all citizens become crime-fighters. The “ends” may be similar, but the “means” by which we achieve those ends are vastly different.

Our decision today is grounded in, and supported by, a legislative enactment from which a public policy clearly emanates.\textsuperscript{161}

The plurality then proceeded to discuss the court’s previous decision in *Adler III*, on which Sears primarily relied on appeal.\textsuperscript{162} The *Wholey* court agreed with the Fourth Circuit’s rejection of the availability of the tort of abusive discharge to provide a remedy to internal whistleblowers in *Adler III* and *Milton*.\textsuperscript{163}

*Adler III* and *Milton* preclude the availability of the tort of abusive discharge for termination motivated by “public reporting” on the grounds that the tort is available only when the plaintiff has refused to commit an illegal act or has a statutory duty to report illegal activity.\textsuperscript{164} *Wholey*, however, expands this limited application. “The critical distinguishing factor between *Adler [III]* and [*Wholey*] is that at the time

\textsuperscript{157} *Id.* at 65-66, 803 A.2d at 498. If Mr. Wholey had reported the suspected criminal activity to the local police district and was fired for doing so, he would have had a viable abusive discharge cause of action. *Id.* at 70, 803 A.2d at 500-01.

\textsuperscript{158} *Id.* at 66, 68-69, 803 A.2d at 498, 500 (Battaglia, J., plurality).

\textsuperscript{159} 421 N.E.2d 876 (Ill. 1981); *Wholey*, 370 Md. at 66, 803 A.2d at 498 (Battaglia, J., plurality).

\textsuperscript{160} See *Wholey*, 370 Md. at 66-67, 803 A.2d at 498 (Battaglia, J., plurality).

\textsuperscript{161} *Id.* at 66-67, 803 A.2d at 498-499 (Battaglia, J., plurality) (citations omitted).

\textsuperscript{162} See *id.* at 68-69, 803 A.2d at 500 (Battaglia, J., plurality); see also *supra* notes 110-115 and accompanying text.

\textsuperscript{163} See *Wholey*, 370 Md. at 69 n.18, 70, 803 A.2d at 500-01 n.18.

\textsuperscript{164} See *id.*
Adler [III] was decided, the [Maryland] legislature had not [yet] enacted the [statutory] provision prohibiting retaliation against a witness for reporting a crime.165 Therefore, the court observed, "no public policy mandate regarding the reporting of criminal activity was discernible."166 As for Milton, while it was decided five years after the enactment of the 1993 misdemeanor "witness protection" statute, the Fourth Circuit continued to rely on the guidance provided by the court of appeals in the first Adler case ("Adler I"), and the facts of the case did not require it to address a remedy for external whistleblowers.167

On the one hand, the plurality's position is an acceptance of Palmateer's outcome with a rejection of its "abstract" un-rooted approach to the source of its public policy.168 On the other hand, the plurality affirmed Adler I's rejection of an internal whistleblowing abusive discharge tort while at the same time expanding the scope of the availability of the tort in light of the 1993 misdemeanor witness protection statute and thereby creating a new external whistleblower abusive discharge tort.169

In conclusion, the plurality stated:

Again, while no legal duty to report criminal activity exists in Maryland, at least with respect to the factual circumstances before us, the Legislature has determined that one who reports criminal activity to appropriate authorities should be statutorily protected from retaliation for such conduct. Therefore, we conclude that a public policy mandate exists for employees who report criminal activity to the appropriate authorities and are subsequently discharged from employment on this basis. We decline petitioner's invitation to adopt a broader public policy mandate for conduct encompassing the investigation of suspected criminal activity of an employee, being of the opinion that such a significant change in our law is best left to the Legislature.170

In his very brief dissenting opinion, Judge Eldridge, joined by Chief Judge Bell, dissented in two aspects: First, from the plurality's holding that the tort was not available to Mr. Wholey; and, second, from the plurality's restriction of the availability of the tort only to external

165. Id. at 69, 803 A.2d at 500.
166. Id.
167. See id. at 69 n.18, 803 A.2d at 500 n.18 (citing Adler v. Am. Standard Co., 291 Md. 31, 432 A.2d 464 (1981)). The Court of Appeals of Maryland also explained that changes in the Maryland Criminal Code had distinguished its answer to a certified question from the federal district court in Maryland that guided the Fourth Circuit's decision in Adler. Id.
168. See id. at 66, 803 A.2d at 498 (Battaglia, J., plurality).
169. Id. at 70, 803 A.2d at 500-01 (Battaglia, J., plurality).
170. Id.
whistleblowers. All that is needed, the dissent stated, is "a sufficiently clear mandate of public policy to support [the plaintiff's] . . . cause of action." According to the dissent, the enactments by the General Assembly protecting various categories of "employee-whistleblowers" "furnish a sufficiently clear mandate" in the instant case. In addition, the dissenting judges expressed their continued disagreement with "the extremely narrow scope which majorities of this court have repeatedly accorded the tort of abusive discharge . . . It is illogical to recognize a tort action and then hold that virtually nothing falls within the action." The dissent does not expressly state its agreement with the plurality's recognition of the "public reporting" tort, but their concurrence is implicit in their argument for a wider availability.

In her concurring opinion, Judge Raker, joined by Judge Wilner, affirmed the denial of the tort to Mr. Wholey on the basis of "the well-reasoned opinion of the Court of Special Appeals." The concurrence rejected the availability of the tort for any whistleblowing for two reasons. First, the case itself was "not ripe for such decision." In the concurring judge's view, there was no need to recognize the availability of the tort for external whistleblowers because Mr. Wholey was only an internal whistleblower. No more was required from the court, the concurrence argued, than its rejection of the availability of the tort for this purpose. Second, the concurrence rejected the availability of the tort because the statute on which the plurality relied

171. Id. at 76, 803 A.2d at 504 (Eldridge, J., dissenting). While future wrongful discharge tort appeal decisions are difficult to predict, it is important to note that Judge Eldridge retired from the Court of Appeals of Maryland in 2003. His replacement, Judge Clayton Greene, Jr. from the Court of Special Appeals of Maryland, was appointed in January of 2004.

172. Wholey, 370 Md. at 76, 803 A.2d at 504 (Eldridge, J., dissenting).

173. Id. The four statutory enactments discussed in the first part of this article would probably satisfy the "sufficiently clear mandate" standard. See supra Part II.

174. Wholey, 370 Md. at 76-77, 803 A.2d at 504-05 (Eldridge, J., dissenting). Associate Judge Eldridge’s position has been stated in earlier cases. For example, the dissent in Chappell v. S. Md. Hosp., Inc., 320 Md. 483, 578 A.2d 766 (1990), in which Judge Eldridge joined, argued that "the adoption of limited administrative remedies for employment discrimination does not indicate a legislative intent to preclude a common law action in which much more comprehensive relief can be obtained." Id. at 500, 578 A.2d at 775 (Adkins, Ret. J., dissenting).

175. Wholey, 370 Md. at 71, 803 A.2d at 501 (Raker, J., concurring).

176. Id. at 72, 803 A.2d at 502 (Raker, J., concurring).

177. See id. at 71-72, 803 A.2d at 502 (Raker, J., concurring). First, Mr. Wholey argued that the tort should be available to all whistleblowers, internal and external; and second, if restricted only to external, then the fact that while employed by Sears he was simultaneously employed as a county Deputy Sheriff made him an external whistleblower. See id. at 63-64, 803 A.2d at 497 (Battaglia, J., plurality).
Whistleblower Protection in the State of Maryland

“does not place any duty upon an employee and is not an expression of clearly mandated public policy that would support the exception created . . . .”

[T]he plurality’s reading of the statute expands the class of people protected under § 762, which only protects a “victim or witness” who [gives testimony or] reports a crime. Under the plurality opinion, the protection of the statute applies to any employee who reports suspected criminal activity to the appropriate law enforcement officials, irrespective of whether there is a duty to report, or whether the employee was a testifying victim or witness.

IV. COMMENTS

A. Are Internal Whistleblowers Ever Protected Under Maryland Law?

There is a question about the correctness of the Wholey plurality’s assertion that “[i]n the limited times that the Legislature has enacted whistle-blower protection to protect private employees, the protection is only valid when the employee/whistle-blower reports the suspect activity externally.”

As the plurality states, MOSHA provides protection only to those employees who are external whistleblowers. Two Maryland statutes, however, provide remedies to private employees who are only internal whistleblowers. Article 49B, the Maryland FEPA, creates a remedy for an employee who suffers employment retaliation simply because the employee has internally opposed a discrimination practice even when the opposing employee is not the victim of the discriminatory action. If the employer has fifteen or more employees, the employee may file a complaint with the Maryland HRC and follow its administrative procedures to get the statutory remedies. If the employer has less than fifteen employees, and the employee is the victim of retaliatory discharge—whether actual or constructive—then the employee has a tort cause of action.

179. Id. at 74, 803 A.2d at 503 (Raker, J., concurring).
180. Id.
181. Id. at 63, 803 A.2d at 496 (Battaglia, J., plurality).
182. See id.
183. See supra Part II.D.
184. See Md. Ann. Code art. 49B, § 15 (2003) (defining “employer” for purposes of FEPA as a business of fifteen or more employees); see id. § 9A (describing the procedure by which an aggrieved employee can file a complaint with the HRC).
185. Molesworth v. Brandon, 341 Md. 621, 637, 672 A.2d 608, 616 (1996) (holding that the tort of abusive discharge is available to remedy gender-based discharge by employers with fewer than fifteen employees). See also Gray, Abusive Discharge supra note 99, at 15; Gray, Wrongful Discharge, supra note 99, at 82-85.
ther, the Maryland Health Care Workers Whistleblower Protection Act expressly creates a remedy for internal whistleblowing. 186

While the Wholey court accurately asserted that the Maryland "legislature has declined to encroach upon the employment decisions of private companies through creation of a general all-encompassing 'whistleblower protection' statute which would protect employees who investigate and internally report suspected criminal activity," 187 it is also true that the Maryland General Assembly has so intruded with two of the three whistleblower statutes that it has enacted to protect private sector employees. 188 As for the three Time whistleblowers, none would have had any remedy under Maryland common law if their employers had retaliated against them for reporting their concerns internally because none of the three had reported suspected criminal activity to a public enforcement authority.

B. Employer Defenses: Intentional Falsehood, Alternative Reason

In addition to the defense of a legitimate, alternative reason for an adverse employment decision, the employer may also claim that the employee's report was an intentional falsehood. 189 Generally, to prevail on a claim of retaliatory discharge, a whistleblower must prove by a preponderance of the evidence that: (1) he made a good faith report of his employer's suspected criminal activity to an enforcement authority; (2) the employer took an adverse action (discharge) against him; and (3) the sole reason he was fired was because he made the report. 190 The intentional falsehood defense may counter the first standard element of a retaliatory discharge claim—that the employee made a good faith report of suspected criminal activity. 191 The Wholey plurality asserted the lack of protection for those who knowingly make a false disclosure. 192

Of course, the protection afforded to those who report criminal activity would be eliminated should such report prove to be false, in accordance with Article 27 Section 150 (a), which provides:

A person may not make a false statement, report, or complaint, or cause a false statement, report, or complaint to be made, to any peace or police officer of this State, . . . of any county, city or other political subdivision of this

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186. See supra notes 53-54, 70 and accompanying text.
188. The other statute, the Maryland Whistleblower Law, provides protection only to employees of the state government's executive branch. See supra Part II.A.
189. See Wholey, 370 Md. at 59 n.13, 803 A.2d at 494 n.13 (Battaglia, J., plurality).
191. See Wholey, 370 Md. at 59 n.13, 803 A.2d at 494 n.13 (Battaglia, J., plurality).
192. Id.
State, . . . or any material part thereof, to be false and with intent to deceive and with intent to cause an investigation or other action to be taken as a result thereof. The Legislature's strong public interest in prohibiting false police reports . . . clearly supercedes any concern for retaliatory discharges that may ensue as a result of these false reports. 193

As long as the employer cannot prove that employee has intentionally and knowingly made a false report to enforcement authorities, the fact that the substance of the disclosure is established to be false is generally not sufficient to defeat a claim of retaliatory discharge. 194 A larger challenge for the employer is to seek to defeat the third element of the retaliatory discharge claim—that the dismissal was caused by the whistleblowing—by introducing evidence of other legitimate reasons for the dismissal that, standing alone, would have resulted in dismissal. 195

C. Other Retaliatory Actions

The four Maryland statutes previously discussed provide a remedy for any adverse retaliatory action. The "external whistleblower" tort of abusive discharge, on the other hand, provides a remedy only when the retaliatory action is a discharge, actual or constructive. 196 If the adverse action is another retaliatory action—such as a demotion, a change to less desirable assignments or work circumstances, or other action less than dismissal—then there is generally no remedy for the whistleblower. 197 Yet the prohibited employer motivation is identical—discriminating against an employee for reporting to public en-

193. Id.
194. See Obst v. Microtron, Inc., 614 N.W.2d 196, 200 (Minn. 2000) ("While there need not be an actual violation of law, the reported conduct must at least implicate a violation of law."). Also, although the courts will tolerate an erroneous claim of suspected criminal activity, they generally will not tolerate a claim made out of bad faith. Id. at 202.
195. The Maryland legislature allows the state to defend itself from a whistleblower claim by asserting that an adverse action against a state executive branch employee would have been taken regardless of the employee's disclosure of information. Md. Code Ann., State Pers. & Pens. § 5-302 (1997 & Supp. 2003) (providing that the subtitle "does not preclude action for defamation or invasion of privacy" and that the subtitle "does not prohibit a personnel action that would have been taken regardless of a disclosure of information").
196. Under Maryland law, an actual discharge is an express dismissal by the employer; a constructive discharge occurs when an employee quits under hostile or abusive circumstances that the employer deliberately created to cause the employee to involuntarily resign. See Beye v. Bureau of Nat'l Affairs, 59 Md. App. 642, 649-51, 477 A.2d 1197, 1201-02 (1984).
forcement authorities employer-controlled conduct as suspected criminal activity. There is no principled basis for not recognizing a tort cause of action whenever any employer adverse conduct is retaliatory. The absence of a comprehensive tort provides a perverse incentive to an employer to retaliate by punishing an employee in ways other than by firing the employee so long as the employer's conduct does not amount to a constructive discharge.

V. CONCLUDING RECOMMENDATION

A. Wisdom of Encouraging Internal Whistleblowers

Two Maryland statutes protect two kinds of internal whistleblowers: those who internally oppose discriminatory practices and those who report violations of the law that constitute specific and substantial injury to the public health and safety. The plurality acknowledged that a case can be made for the protection of internal whistleblowing. The plurality ultimately concluded, however, that its common law power with regard to the tort of abusive discharge was restricted by the requirement of a clear mandate of public policy established by the legislature. The plurality stated:

We acknowledge that some jurisdictions find the distinction between internal investigating and external reporting to be irrelevant. For example, in Sullivan v. Massachusetts Mut. Life Ins. Co, 802 F. Supp. 716 (D. Conn. 1992), the federal court, in a prospective opinion concerning Massachusetts law, considered the whistle-blowing claim of a former employee . . . . The employer contended that the plaintiff had not made a sufficient claim because the suspected violations were not reported to outside authorities, and the plaintiff never threatened to speak of the suspected violations to any authorities . . . . The court agreed with the plaintiff, finding that internal whistleblowing was sufficient and said:

This rule makes sense. A rule that would permit the employer to fire a whistleblower with impunity before the employee contacted the authorities would encourage employers promptly to discharge employees who bring complaints to their attention, and would give employees with complaints an incentive to bypass management and go directly to the authorities. This would deprive manage-

198. See generally Gray, Wrongful Discharge, supra note 99, at 79.
199. See supra Part II.D (discussing the Maryland Fair Employment Practices Act and its applicability to internal whistleblowers).
200. See supra Part II.B (discussing the Health Care Worker Whistleblower Protection Act and its applicability to internal whistleblowers).
201. See supra note 105 and accompanying text (discussing the Wholey plurality's acknowledgment of the fact that other states had extended the tort of abusive discharge to internal whistleblowers).
202. See supra notes 151-153 and accompanying text.
ment of the opportunity to correct oversights straightaway, solve the problem by disciplining errant employees, or clear up a misunderstanding on the part of a whistleblower. The likely result of a contrary rule would be needless public investigations of matters best addressed internally in the first instance. Employers benefit from a system in which the employee reports suspected violations to the employer first; the employee should not, in any event, be penalized for bestowing that benefit on the employer . . . .

Whether the United States District Court for the District of Connecticut's hypothesis on how the requirement of external reporting may impact the internal employee reporting has any merit is inapposite. We refuse to create a public policy grounded only in mere supposition about the employer/employee relationship; the public policy mandates in this State must be based on some discernible principle of law as articulated by the Legislature or the courts.203

B. A Comprehensive State Statute

The Maryland General Assembly should consider enacting a comprehensive whistleblower statute along the lines of the Health Care Act. First, a comprehensive statute with a one-year statute of limitations would provide a private cause of action with a reasonable limitation period.204 Second, it would protect internal and external whistleblowers205 (other than those who go to the press), in both the private and public (other than those employed in the executive branch)206 sectors. Third, it would require as a condition of protection that the employee first attempt to resolve the situation internally and have submitted a signed statement to the employer about the suspected violation. Fourth, it would allow for an employer defense of dismissal for a reason other than the employee’s disclosure of the information. Fifth, it would provide for an award of reasonable attorney’s fees and expenses to the employer if an employee brings an action in bad faith and without a basis in law or fact.

204. See supra note 57 and accompanying text (discussing the similar provisions of the Health Care Worker Whistleblower Protection Act).
205. The enactment of a comprehensive statute that protects internal whistleblowers as well as external whistleblowers would provide an incentive to corporations to implement “a mechanism for its employees to report organizational wrongdoing” without fear of reprisal and thus capture the corporate benefits of “improved worker safety, morale, and conduct, as well as decreased legal risk.” Callahan et al., supra note 22, at 196.
206. Employees of the executive branch are covered by Executive Branch Employee Whistleblower Protection Act. See Part II.A.
The enactment of this type of comprehensive statute clearly would preempt *Wholey*. It would also raise the question of how its enactment relates to the earlier four specific statutes. The gap in the Health Care Act is that it applies only to disclosures by non-state licensed employees reporting suspected violations of a law that created specific substantial threats to public health or safety.  The gap in the Health Care Act is that it applies only to disclosures by non-state licensed employees reporting suspected violations of a law that created specific substantial threats to public health or safety. 207 It does not cover all employees and all violations of the law. 208 The proposed comprehensive statute would cover this type of gap.

The gap under the Maryland FEPA is that there is no statutory or common law remedy for employees of "statutory small employers" who are the victims of retaliatory action other than discharge. The proposed statute would provide a remedy for these types of whistleblowers. 209

Finally, the MOSHA does not provide a remedy for retaliatory actions against internal whistleblowers. 210 A new, comprehensive statute would also fill that gap by providing a tort remedy. Under such a statute, if *Time's* featured "Person of the Year" had suffered retaliatory actions from their employers for their internal whistleblowing activities, they would have had a legal remedy in Maryland.

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207. *See supra* notes 60 and accompanying text.
208. *Id.*
209. One difficulty here is the existing disparity in remedies available under the tort theory of recovery in contrast with those available under the statute. *See generally* Gray, *Abusive Discharge*, *supra* note 99, at 13.
210. *See Part II.C.*